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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. FRANKLIN RYAN JR., Defendant and Appellant.	A103909 (Solano County Super. Ct. No. VCR166371)

Franklin Ryan Jr. was convicted after jury trial for drug possession and firearm offenses, and he was sentenced to seven years imprisonment. On appeal, he claims the trial court erred in failing to give a unanimity instruction sua sponte and in denying a motion to sever his trial from that of his brother. With respect to his sentence, appellant argues the court mistakenly believed it lacked discretion to strike an enhancement and erred in imposing concurrent sentences for two firearm offenses. Under the circumstances of this case, we conclude the failure to give a unanimity instruction was reversible error because the evidence disclosed two ways in which appellant could have possessed contraband for sale and it is not clear beyond a reasonable doubt that jurors unanimously agreed appellant committed the same criminal act. Because we resolve the case on this ground, we do not address appellant's remaining claims.

BACKGROUND

On March 14, 2003, a group of Vallejo police officers conducting surveillance noticed several people make short visits to an apartment at 300 Florida Street. Around

6:30 p.m., uniformed officers executed a search warrant at the address. The warrant named Lamar Ryan, appellant's brother, and sought cocaine and items relating to the use and sale of cocaine. As he approached the building, Detective Steven Kent Jr. saw three men sitting on a bed in a room near the front door. Detective Kent knocked and announced their presence, and the officers quickly proceeded inside the apartment after indications the suspects were "running" inside.

The officers found three men in the front bedroom—appellant, his brother Lamar Ryan, and Renardo Brown—and ordered them to sit on the bed. In this room, the police noticed a clear plastic sandwich bag sitting on top of a storage bin located between the bed and the wall. The bag contained 35 "rocks" of cocaine base, each individually wrapped in plastic and tied at one end, weighing a total of 15.82 grams. Another plastic bag containing seven individually wrapped and tied rocks of cocaine base, totaling 1.41 grams, was discovered when officers opened the top drawer of a dresser located against a wall in the bedroom. On the top shelf of a closet in this bedroom, officers found a revolver loaded with five live cartridges. On the floor of another bedroom in the apartment, the police discovered two plastic bags filled with several smaller green baggies (some stamped with white "Playboy bunny" images) of a type commonly used to package drugs. On a shelf above these bags were two boxes of sandwich bags, one of which also held three razor blades. Mail and other papers bearing the name Dinisha Wallace were found in the bedroom where the cocaine was discovered. Mail bearing appellant's name, but a different address, was found in a hallway closet adjacent to this bedroom.

During a booking search, police found a baggie containing eight smaller baggies inside a pocket of Lamar Ryan's pants. Like the materials found in the rear bedroom, the small baggies were green and stamped with white Playboy bunny images. Each of these smaller baggies contained methamphetamine, for a total weight of 2.45 grams.

After he was arrested and read the *Miranda* warnings,[1] appellant was interviewed by Detective Kent. Appellant told Kent he lived at the 300 Florida Street apartment with his girlfriend, Dinisha Wallace, and they shared the bedroom where the cocaine base was found. He admitted that the seven cocaine rocks found in the dresser drawer belonged to him, but he denied knowledge of the larger bag of cocaine rocks found on top of the storage bin. Appellant said his girlfriend "knew nothing about what was going on in the house." He also said he knew there was a gun in the closet, but he explained his younger brother's lawyer had asked him to keep the gun because it might be needed in the brother's case. Appellant knew he was not supposed to have a gun because he had a prior conviction.

Appellant and Lamar Ryan were jointly charged with possession for sale of an unspecified amount of cocaine base (Health & Saf. Code, § 11351.5). Appellant was also charged with being a felon in possession of a firearm (Pen. Code, § 12021, subd. (a)(1)) and with possessing a controlled substance while armed with a firearm (Health & Saf. Code, § 11370.1, subd. (a)). As to the possession for sale count, the information alleged appellant had suffered two prior convictions; as to all three counts, the information alleged appellant was released on bail at the time of the offenses.

Over both of their objections, the charges against appellant and against Lamar Ryan were tried together. At trial, Detective Les Bottomley gave expert testimony for the prosecution that both the 35 rocks of cocaine base found on top of the storage bin and the seven rocks found in the dresser drawer were possessed for purposes of sale. Based on the similar packaging (twisted plastic tied at one end), Detective Bottomley also stated his belief that the seven rocks in the dresser were once part of the same cache as the other 35 cocaine rocks.

Appellant offered evidence that Lamar Ryan told the police the rear bedroom of the apartment was his. In addition, the parties stipulated that if called Lilly Ryan, appellant's mother, would testify that appellant lived with her during the relevant time

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436.

period and not at the 300 Florida Street apartment. Finally, Dinisha Wallace, appellant's girlfriend and the mother of his child, testified for the defense. In March, 2003, Wallace had been living alone at the 300 Florida Street apartment for about one month. Although appellant occasionally spent the night, he did not live there and did not have a key. Lamar Ryan never slept over. Wallace left for work early on the morning of March 14, 2003, and when she returned home around 5:30 p.m. appellant, Lamar Ryan and Renardo Brown were waiting for her by the front door. Wallace let them in but left about 15 minutes later. When she left, the men were sitting on the bed in the front bedroom, preparing to play a video game. Wallace testified there were no baggies of drugs in her bedroom when she left in the morning or when she returned home in the evening. To her knowledge, appellant had never used her house to possess or sell narcotics, nor would she have allowed Lamar Ryan to use her home to sell drugs.

The jury found appellant guilty of the three counts against him and also found Lamar Ryan guilty of the two counts alleged against him. Appellant waived a jury trial on his prior convictions, and the court found allegations true that appellant had suffered two prior convictions within the meaning of Health and Safety Code sections 11370, subdivision (a) and 11370.2. The court also took judicial notice of the fact that appellant was released on bail in another case at the time of the offenses. Appellant was sentenced to the midterm of four years imprisonment on the possession for sale charge, with concurrent sentences of two years on the firearm possession charge and three years on the possession of controlled substance with firearm charge also imposed. The court imposed a consecutive three-year enhancement for appellant's prior felony conviction and a consecutive two-year enhancement for the on-bail violation; however, the court stayed imposition of the two-year on-bail enhancement pending appellant's conviction in the underlying case. The total term, excluding this stayed enhancement, was seven years imprisonment.

DISCUSSION

Appellant claims the trial court erred in failing to instruct the jury that they must unanimously agree on the act that constituted possession for sale of cocaine base.

Specifically, because the evidence disclosed two separate caches of cocaine base—i.e., the bag of 35 rocks found on top of the storage bin and the bag of seven rocks found in the dresser drawer—and the prosecution did not specify which evidence it was relying upon to support the charge of possession for sale, appellant contends the jury should have been instructed it had to unanimously agree on the specific act of possession that formed the basis of his conviction in count one. We agree the court's failure to give a unanimity instruction was reversible error.

" 'It is fundamental that a criminal conviction requires a unanimous jury verdict (Cal. Const., art. I, § 16; *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [])." [Citation.] What is required is that the jurors unanimously agree defendant is criminally responsible for '*one discrete criminal event*.' [Citation.] '[W]hen the accusatory pleading charges a single criminal act and the evidence shows more than one such unlawful act, *either* the prosecution must select the specific act relied upon to prove the charge *or* the jury must be instructed in the words of CALJIC No. 17.01 or 4.71.5 or their equivalent that it must unanimously agree beyond a reasonable doubt that defendant committed the same specific criminal act.' [Citation.]" (*People v. Thompson* (1995) 36 Cal.App.4th 843, 850; see also *People v. Russo* (2001) 25 Cal.4th 1124, 1132 [observing "cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act"].) Thus, when circumstances call for it, the trial court is required to give a unanimity instruction sua sponte. (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534.) "This requirement of unanimity as to the criminal act 'is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.' [Citation.]" (*People v. Russo*, *supra,* 25 Cal.4th at p. 1132.)

Several cases have concluded a unanimity instruction is required when the evidence involves possession of discrete units of a controlled substance. In *People v. King* (1991) 231 Cal.App.3d 493, 497, officers executing a search warrant at the defendant's residence found a Ziploc baggie containing methamphetamine and a syringe

loaded with methamphetamine inside a purse in the living room and also found a smaller Ziploc baggie containing methamphetamine inside a ceramic statue on a shelf above the kitchen sink. The defendant offered different defenses to the two stashes of methamphetamine: She argued the purse belonged to another woman who was detained after attempting to flee the scene, and the drugs inside the statue belonged to her boyfriend. (*Id.* at pp. 497-499.) Relying on *People v. Crawford* (1982) 131 Cal.App.3d 591, a case addressing the need for a unanimity instruction in the context of multiple firearm possession, the appellate court reversed the defendant's conviction for possessing methamphetamine for sale. (*People v. King*, *supra,* 231 Cal.App.3d at pp. 499-502.) The court held, "[I]n a prosecution for possession of narcotics for sale, where actual or constructive possession is based upon two or more individual units of contraband reasonably distinguishable by a separation in time and/or space and there is evidence as to each unit from which a reasonable jury could find that it was solely possessed by a person or persons other than the defendant, absent an election by the People CALJIC No. 17.01 must be given to assure jury unanimity." (*Id.* at pp. 501-502, footnote omitted.)

Similarly, in *People v. Castaneda* (1997) 55 Cal.App.4th 1067, 1069-1070, officers found a small bindle of tar heroin taped to the back of a television set during a search of the defendant's ex-wife's house and found another bindle of tar heroin in the defendant's pocket when he was searched in the sheriff's station. On appeal, the court concluded a unanimity instruction should have been given because the evidence disclosed two different ways in which the defendant could have violated the single charge of heroin possession and the defendant offered separate defenses to each act of possession. (*Id.* at pp. 1070-1071.) The defendant's son testified the heroin found on the television set was his, and defense counsel argued in summation that the police had planted the heroin recovered from the defendant's pocket. (*Id.* at p. 1070.) Without a unanimity instruction advising them they had to unanimously agree on which act constituted the offense, "some jurors could have found Castaneda guilty of possession based on the heroin found in his pocket, but had a reasonable doubt as to whether he

possessed the heroin found on the television; while others could have thought the heroin in his pocket was planted (or otherwise had a reasonable doubt as to whether he knowingly possessed it) and based their guilty verdict on the heroin found on the television." (*Id.* at p. 1071.) Because there was no way of knowing whether the jurors reached a truly unanimous verdict, the conviction had to be reversed. (*Ibid.*; see also *People v. Wesley* (1986) 177 Cal.App.3d 397, 400-401 [reversal for lack of unanimity instruction where cocaine found in search of home and bindle of heroin found in defendant's waistband were the basis of defendant's conviction of possessing for sale "a controlled substance, 'to wit, cocaine *and* heroin' "].)

The Attorney General directs us to authority holding a unanimity instruction "is not required where the offenses are so closely connected to form a single transaction or where the offense itself consists of a continuous course of conduct. [Citation.]" (*People v. Thompson*, *supra,* 36 Cal.App.4th at p. 851.) The "continuing course of conduct" exception has been applied to a limited category of crimes, such as child molestation and failure to provide for a minor child, that are committed by a series of acts resulting in a cumulative criminal effect. (*People v. Sanchez* (2001) 94 Cal.App.4th 622, 631-632.) It is clearly not applicable to a crime of drug possession. Nor do we believe the evidence in this case necessarily established only a single act of possession. Although they were found in the same room as the 35 rocks lying in a baggie in plain view on top of a storage bin, the seven rocks of cocaine base were inside a *closed* drawer of a dresser located across the bedroom from the storage bin. The items of contraband in this case were therefore "reasonably distinguishable by a separation in . . . space" such that a unanimity instruction should have been given. (See *People v. King*, *supra,* 231 Cal.App.3d at pp. 501-502.)

Failure to give a unanimity instruction is governed by *Chapman v. California* (1967) 386 U.S. 18, which allows an appellate court to affirm only if the error is harmless beyond a reasonable doubt. (*People v. Wolfe* (2003) 114 Cal.App.4th 177,

185-188; *People v. Melhado*, *supra,* 60 Cal.App.4th at p. 1536.)[2] Under this standard, "Where the record provides no rational basis, by way of argument or evidence, for the jury to distinguish between the various acts, and the jury must have believed beyond a reasonable doubt that defendant committed all acts if he committed any, the failure to give a unanimity instruction is harmless. [Citation.] Where the record indicates the jury resolved the basic credibility dispute against the defendant and therefore would have convicted him of any of the various offenses shown by the evidence, the failure to give the unanimity instruction is harmless. [Citation.]" (*People v. Thompson*, *supra*, 36 Cal.App.4th at p. 853.)

Here, the evidence and argument did provide a reasonable basis for jurors to distinguish between the different acts of possession. Appellant told the police the seven cocaine rocks in the dresser drawer were his, but he denied possession of the larger bag of 35 cocaine rocks. Appellant's counsel also distinguished between the seven rocks and the 35 rocks in closing argument to the jury. Counsel argued that Lamar Ryan and Renardo Brown were the ones who possessed the 35 rocks of cocaine, because all packaging materials were found in Lamar's bedroom and some evidence suggested Lamar and Renardo Brown tried to hide the bag of 35 rocks when the police arrived. As to the seven rocks of cocaine in the dresser, counsel argued appellant's admission was coerced because the police threatened to pursue appellant's girlfriend, then seven

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[2] There is a split of opinion among the Courts of Appeal regarding the applicable standard of harmless error. (See *People v. Wolfe, supra,* 114 Cal.App.4th at pp. 185-186 [collecting cases].) Some courts have applied the state law standard of harmless error (*People v. Watson* (1956) 46 Cal.2d 818, 836) after concluding there is no federal constitutional right to a unanimous jury verdict. (E.g., *People v. Vargas* (2001) 91 Cal.App.4th 506, 562.) Other courts have concluded the federal constitutional standard of *Chapman v. California*, *supra,* 386 U.S. 18, applies because failure to give a unanimity instruction has the effect of lowering the prosecution's burden of proof, in that it allows for a conviction even if fewer than 12 jurors are persuaded beyond a reasonable doubt of the defendant's guilt as to a specific criminal act. (E.g., *People v. Wolfe*, *supra,* 114 Cal.App.4th at pp. 186-188; *People v. Deletto* (1983) 147 Cal.App.3d 458, 472.) We adhere to our decision in *People v. Melhado* that the *Chapman* standard of error applies. (*People v. Melhado*, *supra*, 60 Cal.App.4th at p. 1536.)

months pregnant with his child, if he did not take responsibility for the contraband found in her home. Appellant's counsel also complained to the jury that it was unclear whether, with respect to the charge of possession for sale, the prosecution was relying on the seven rocks or the 35 rocks, or both, to support either count one (possession for sale) or count four (possession while armed). As to both charges, counsel told the jury, "You don't know what the prosecution's theory is. . . . [I]s it the seven rocks found in the dresser, or 35 rocks that were found on top of the Tupperware?" Finally, counsel for codefendant Lamar Ryan also distinguished between the two stashes of contraband in closing argument. Lamar Ryan's counsel argued Renardo Brown had sole possession of the 35 rocks, while appellant had admitted the other seven rocks belonged to him: "So we have one person having the 35 rocks. Another person having the seven rocks. Lamar Ryan didn't have anything."

Thus, the evidence and argument presented to the jury disclosed two possible ways appellant could have been guilty of the single charge of possessing cocaine base for sale. Some jurors could have concluded appellant possessed for sale the seven rocks in the dresser drawer, which he had admitted belonged to him during police questioning and which the prosecution's expert testified was a saleable amount, but harbored a reasonable doubt as to whether he possessed for sale the 35 rocks on the storage bin, of which he had disclaimed knowledge. Other jurors may have believed appellant possessed the 35 rocks for sale but harbored a reasonable doubt as to whether he possessed for sale the seven rocks in the dresser drawer—either because they believed he possessed this smaller amount for personal use, not sale, or because they disbelieved Detective Kent's testimony relating appellant's admission to possessing the seven rocks.[3] Thus, all jurors could have found appellant guilty of possessing cocaine base for sale without unanimously agreeing upon the specific possession that constituted the

[3] In cross-examining Detective Kent, defense counsel pointed out that the tape of appellant's interview was not available to confirm the officer's account of appellant's admission.

offense, and reversal is required. (See, e.g., *People v. Castaneda*, *supra*, 55 Cal.App.4th at p. 1071; see also *People v. Deletto*, *supra,* 147 Cal.App.3d at p. 472 [noting the unanimity instruction "is designed in part to prevent the jury from amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt that a defendant must have done *something* sufficient to convict on one count"].)

DISPOSITION

The judgment is reversed.

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McGuiness, P.J.

We concur:

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Parrilli, J.

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Pollak, J.